Ibrahim bin Mohamad v Ketua Polis Daerah Johor Bahru & Ors

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 21-85-1995
ABDUL MALIK ISHAK J
8 MAY 1996

Civil Procedure *— Declaration — Writ endorsed with statement of claim for declarations — Attempt to circumvent leave provisions of Rules of the High Court 1980 O 53 — Whether abuse of process of court*

Civil Procedure *— Pleadings — Striking out statement of claim — Discloses no reasonable cause of action — Whether affidavit evidence supporting application to strike out to be considered — Rules of the High Court 1980 O 18 r 19(1)(a) & (2)*

Equity *— Defences — Laches and acquiescence — Whether laches a bar to declaration*

On 22 March 1996 the defendants' application to strike out the plaintiff's writ and statement of claim under O 18 r 19(1)(a) of the Rules of the High Court 1980 ('RHC') was dismissed by the senior assistant registrar. This was the defendants' appeal to the judge in chambers against the decision of the registrar. The defendants had not filed an affidavit to support their application to strike out; the plaintiff, however, had filed two affidavits to challenge the said application. The issue that arose in this appeal was whether, in an application under O 18 r 19(1)(a) of the RHC, the court was compelled to take into account the plaintiff's affidavits or must the court be content to look at the statement of claim only. The defendants also contended that: (1) the delay on the part of the plaintiff in filing his writ resulted in the claim being statute-barred under s 2(a) of the Public Authorities Protection Act 1948 ('the Act'); (2) the doctrine of laches estopped the plaintiff from seeking a declaration; and (3) the declarations sought in the writ and statement of claim were an abuse of the process of court.

Held, allowing the defendants' appeal:

(1) Two fundamental principles of striking out are that the parties will not be easily driven from the judgment seat and that the dismissal of proceedings may often be required by the very essence of justice to be done. Bearing in mind these principles and the fact that the rules of the RHC must be strictly obeyed for the expeditious despatch of litigation, the court ought not to have regard to any affidavit evidence in determining the sole question of whether the statement of claim discloses a reasonable cause of action (see p 21D–H); *New Straits Times (M) Bhd v Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 MLJ 226, *Abu Bakar bin Haji Yusuf v Mohamed Hamzah bin Hanapiah & Anor* [1978] 2 MLJ 78, *Dyson v A-G* [1911] 1 KB 410, *Lawrance v Lord Norreys* (1890) 15 App Cas 210, *Metropolitan Bank Ltd v*

Pooley (1885) 10 App Cas 210, *Riches v DPP* [1973] 2 All ER 935, *Republic of Peru v Peruvian Guano Co* (1887) 36 Ch D 489, *A-G of the Duchy of Lancaster v London and North Western Railway Co* [1892] 3 Ch 274 and *Wenlock v Moloney & Ors* [1965] 2 All ER 871 followed; *Suppuletchimi v Palmco Bina Sdn Bhd* [1994] 2 MLJ 368 not followed.

(2) Section 2(a) of the Act provides that limitation sets in 36 months after the date of the act of the purported wrongful dismissal. It was beyond peradventure that the long inordinate delay of 4 years 4 months and 22 days should be construed against the plaintiff and that on this ground alone the plaintiff's claim should be dismissed (see pp 23F, 25C); *Riches v DPP* [1973] 2 All ER 935, *Tio Chee Hing & Ors v Government of Sabah* [1981] 1 MLJ 207 and *Haji Hussin bin Haji Ali & Ors v Datuk Haji Mohamed bin Yaacob & Ors and connected cases* [1983] 2 MLJ 227 followed.

(3) It is trite law that in equity, a plaintiff is bound to prosecute his claim without undue delay. A court of equity will not entertain stale demands or where the plaintiff has slept upon his legal rights and acquiesced for a considerable length of time. The principle of laches should be applied in favour of the defendants. The doctrine of estoppel could also be invoked in favour of the defendants (see pp 25F, 26B); *Eshah bte Sa'at v Meriam bte Sa'at & Ors* [1975] 2 MLJ 97 followed.

(4) The declarations sought in the writ and statement of claim were an abuse of the process of the court as the plaintiff sought to circumvent O 53 of the RHC and the leave requirement therein as well as the limitation impediment by filing a writ endorsed with a statement of claim for several declarations (see p 27D–G); *Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru* [1995] 2 MLJ 287 followed.

[Bahasa Malaysia summary

Pada 22 Mac 1996 permohonan defendan-defendan untuk membatalkan writ dan pernyataan tuntutan plaintif di bawah A 18 k 19(1)(a) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') telah ditolak oleh penolong kanan pendaftar. Ini adalah rayuan defendan-defendan kepada hakim dalam kamar terhadap keputusan pendaftar itu. Defendan-defendan telah tidak memfailkan afidavit untuk menyokong permohonan mereka untuk pembatalan; plaintif, walau bagaimanapun, telah memfailkan dua afidavit untuk melawan permohonan tersebut. Isu yang timbul di dalam rayuan ini adalah sama ada, dalam suatu permohonan di bawah A 18 k 19(1)(a) KMT, mahkamah terpaksa mengambil kira afidavit-afidavit plaintif atau mestikah mahkamah berpuas hati dengan melihat pernyataan tuntutan sahaja. Defendan-defendan juga menegaskan bahawa: (1) kelewatan oleh pihak plaintif dalam memfailkan writnya mengakibatkan tuntutan itu menjadi terhad oleh statut di bawah s 2(a) Akta Perlindungan Pihak Berkuasa Awam 1948 ('Akta berkenaan'); (2) doktrin 'laches'

A mengestop plaintif daripada memohon suatu deklarasi; dan (3) deklarasi-deklarasi yang dipohon dalam writ dan pernyataan tuntutan adalah suatu penyalahgunaan proses mahkamah.

Diputuskan, membenarkan rayuan defendan-defendan:

B (1) Dua prinsip asas pembatalan adalah bahawa pihak-pihak tidak akan dihalau daripada tempat penghakiman dengan mudah dan bahawa pembuangan prosiding mungkin sering perlu dibuat atas dasar intipati keadilan. Mengingati prinsip-prinsip ini serta fakta bahawa kaedah-kaedah dalam KMT perlu dipatuhi secara ketat untuk menyelesaikan litigasi dengan segera, mahkamah tidak C patut mengendahkan apa-apa keterangan afidavit dalam menentukan persoalan tunggal sama ada pernyataan tuntutan menunjukkan suatu kausa tindakan yang munasabah (lihat ms 21D–H); *New Straits Times (M) Bhd v Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 MLJ 226, *Abu Bakar bin Haji* D *Yusuf v Mohamed Hamzah bin Hanapiah & Anor* [1978] 2 MLJ 78, *Dyson v A-G* [1911] 1 KB 410, *Lawrance v Lord Norreys* (1890) 15 App Cas 210, *Metropolitan Bank Ltd v Pooley* (1885) 10 App Cas 210, *Riches v DPP* [1973] 2 All ER 935, *Republic of Peru v Peruvian Guano Co* (1887) 36 Ch D 489, *A-G of the Duchy of Lancaster v London and North Western Railway Co* [1892] 3 Ch E 274 dan *Wenlock v Moloney & Ors* [1965] 2 All ER 871 diikut; *Suppuletchimi v Palmco Bina Sdn Bhd* [1994] 2 MLJ 368 tidak diikut.

(2) Seksyen 2(a) Akta berkenaan memperuntukkan bahawa had masa akan bermula 36 bulan selepas tarikh tindakan pemecatan salah F yang dikatakan. Adalah melampaui keraguan bahawa kelewatan panjang yang luar biasa selama 4 tahun 4 bulan 22 hari patut ditafsirkan menentang plaintif dan bahawa atas alasan ini sendiri tuntutan plaintif patut dibuang (lihat ms 23F, 25C); *Riches v DPP* [1973] 2 All ER 935, *Tio Chee Hing & Ors v Government of* G *Sabah* [1981] 1 MLJ 207 dan *Haji Hussin bin Haji Ali & Ors v Datuk Haji Mohamed bin Yaacob & Ors and connected cases* [1983] 2 MLJ 227 diikut.

(3) Adalah undang-undang lazim bahawa dalam ekuiti, seseorang plaintif adalah terikat untuk mendakwa tuntutannya tanpa kelewatan yang tidak berpatutan. Sebuah mahkamah ekuiti tidak H akan melayani tuntutan lapuk atau satu tuntutan di mana plaintif telah tidur di atas hak-hak undang-undangnya dan telah membuat akuiesens untuk jangka masa yang agak panjang. Prinsip 'laches' patut terpakai memihak kepada defendan-defendan. Doktrin estopel juga boleh dipakai memihak kepada defendan-defendan I (lihat ms 25F, 26B); *Eshah bte Sa'at v Meriam bte Sa'at & Ors* [1975] 2 MLJ 97 diikut.

(4) Deklarasi-deklarasi yang dipohon dalam writ dan pernyataan tuntutan adalah suatu penyalahgunaan proses mahkamah kerana plaintif telah cuba untuk memintasi A 53 KMT dan keperluan

untuk kebenaran di dalamnya serta batasan had masa dengan memfailkan writ yang diindorskan dengan pernyataan tuntutan untuk beberapa deklarasi (lihat ms 27D–G); *Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru* [1995] 2 MLJ 287 diikut.]

Notes

For cases on declaration, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1104–1126.

For cases on striking out, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2649–2676.

For cases on laches and acquiescence, see 6 *Mallal's Digest* (4th Ed) paras 1462–1471.

Cases referred to

A-G of the Duchy of Lancaster v London and North Western Railway Co [1892] 3 Ch 274

Abbott v Sullivan & Ors [1952] 1 KB 189

Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru [1995] 2 MLJ 287

Abu Bakar bin Haji Yusuf v Mohamed Hamzah bin Hanapiah & Anor [1978] 2 MLJ 78

Alnwick, The [1965] P 357

Barnard & Ors v National Dock Labour Board & Ors [1953] 2 QB 18

Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 3) [1970] Ch 506

Cooper v Wilson & Ors [1937] 2 QB 309

Davey v Bentinck [1893] 1 QB 185

Dyson v A-G [1911] 1 KB 410

Erlanger v New Sombrero Phosphate Co (1878) 3 App Cas 1218

Eshah bte Sa'at v Meriam bte Sa'at & Ors [1975] 2 MLJ 97

Gan Hay Chong v Siow Kian Yuh & Anor [1975] 2 MLJ 129

Gniezno, The [1967] 2 All ER 738

Haji Hussin bin Haji Ali & Ors v Datuk Haji Mohamed bin Yaacob & Ors and connected cases [1983] 2 MLJ 227

Hallet's Estate, Re; Knatchbull v Hallett (1880) 13 Ch D 696

Hampshire County Council v Shonleigh Nominees Ltd [1970] 2 All ER 144

Jungheim, Hopkins & Co v Foukelmann [1909] 2 KB 948

Karpal Singh & Anor v PP [1991] 2 MLJ 544

Land Executive Committee of Federal Territory v Syarikat Harper Gilfillan Bhd [1981] 1 MLJ 234

Lawrance v Lord Norreys (1890) 15 App Cas 210

Lee v The Showmen's Guild of Great Britain [1952] 2 QB 329

Lindsay Petroleum Co v Hurd (1874) LR 5 PC 221

Llandovery Castle, The [1920] P 119

Metropolitan Bank Ltd v Pooley (1885) 10 App Cas 210

Miller-Mead v Minister of Housing and Local Government & Anor [1963] 2 QB 196

Moorgate Mercantile Co Ltd v Twitchings [1975] 3 All ER 314

New Straits Times (M) Bhd v Kumpulan Kertas Niaga Sdn Bhd & Anor [1985] 1 MLJ 226

Oakland Metal Co Ltd v D Benaim & Co Ltd [1953] 2 QB 262
Oil Products Trading Co Ltd v Societe Anonyme Societe de Gestion D'Entreprises Coloniales (1934) 150 LT 475
Quinn v Leathem [1901] AC 495
Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd [1993] 3 MLJ 16
Republic of Peru v Peruvian Guano Co (1887) 36 Ch D 489
Riches v DPP [1973] 2 All ER 935
Smith v Clay (1767) 3 Bro CC 639n
Smith v Harris [1939] 3 All ER 960
Suppuletchimi v Palmco Bina Sdn Bhd [1994] 2 MLJ 368
Tio Chee Hing & Ors v Government of Sabah [1981] 1 MLJ 207
Vine v National Dock Labour Board [1957] AC 488
Wenlock v Moloney & Ors [1965] 2 All ER 871
Willis v Earl Beauchamp (1886) 11 PD 59

Legislation referred to

Public Authorities Protection Act 1948 s 2(a)
Rules of the High Court 1980 O 18 r 19(1)(a), (2), O 53

Noordin Hussin (*Tia & Noordin*) for the plaintiff.
Teo Say Eng (Senior Federal Counsel) for the defendants.

Abdul Malik Ishak J: This was an appeal to the judge in chambers in encl 17 against the decision of the senior assistant registrar ('the registrar') who had on 22 March 1996 dismissed the defendants' application in encl 8 to strike out the plaintiff's writ indorsed with the statement of claim in encl 2. The defendants relied solely on O 18 r 19(1)(a) of the Rules of the High Court 1980 ('the RHC') to advance their application in encl 8 and for convenience that rule is reproduced hereinunder:

> 19(l) The court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement, of any writ in the action, or anything in any pleading or in the indorsement, on the ground that—
>
> (a) It discloses no reasonable cause of action or defence, as the case may be; ...

The defendants did not file a supporting affidavit to back up their application in encl 8. The plaintiff filed two affidavits to challenge encl 8. One was in encl 10 that was affirmed on 9 June 1995 and filed on 15 June 1995. The other was in encl 15 that was affirmed on 6 February 1996 and filed on 9 February 1996. The issue that arose was whether in an application under O 18 r 19(l)(a) of the RHC this court must be compelled to take into account the plaintiff's affidavits in encls 10 and 15 or must this court be content to look at the statement of claim only? The answer seems to be found in O 18 r 19(2) of the RHC where it says that:

> 19(2) No evidence shall be admissible on an application under paragraph (1)(a).

It must be borne in mind that such a prohibition as clearly laid out in O 18 r 19(2) of the RHC is not meant to decorate the pages of the RHC

but rather it should be vigorously applied and obeyed. The Rules Committee must have devised the rules for the expeditious despatch of litigation and, consequently, the courts must simply not stand idle but instead rise up to the occasion and enforce it accordingly. It is not surprising to note with awe that Mohamed Azmi FJ speaking for the Federal Court in *New Straits Times (M) Bhd v Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 MLJ 226 (FC), in strong terms construed O 18 r 19(1)(a) of the RHC in this way (at p 227):

> It is therefore clear law that in an application to strike out pleadings under O 18 r 19(1)(a), no evidence shall be admissible, and the court must consider only the pleadings for the purpose of determining whether the statement of claim disclosed no reasonable cause of action or the statement of defence disclosed no defence. The test to be applied is whether on the face of the pleading, the court is prepared to say that the cause of action or the defence is obviously unsustainable (see *A-G of the Duchy of Lancaster v L and NW Ry Co* [1892] 3 Ch 274).

Syed Agil Barakbah J in *Abu Bakar bin Haji Yusuf v Mohamed Hamzah bin Hanapiah & Anor* [1978] 2 MLJ 78 in the same vein said at p 79:

> Where the ground for striking out the statement of claim is that it discloses no reasonable cause of action, no affidavit is admissible. That is clear from the terms of the rule itself (per Chitty J in *Republic of Peru v Peruvian Guano Co* (1887) 36 Ch D 489).

In *Karpal Singh & Anor v PP* [1991] 2 MLJ 544 (SC), the then Supreme Court had to consider the question of 'whether the court has a general inherent power to protect its process from abuse to safeguard an accused person from oppression or prejudice by striking out frivolous proceedings?', and Abdul Hamid Omar LP speaking for the Supreme Court in erudite terms had this to say at p 549:

> The court must be careful that the decision is not in conflict with the intention of the legislature as indicated in statutory powers. The inherent power apparently cannot be invoked to override an express provision of law or when there is another remedy available. Where the legislature has provided a particular mode of action or has vested an authority with powers to act in a particular manner and has prescribed the conditions limiting the scope of such action, the court cannot act outside those powers and conditions.

Translating the sage words of Abdul Hamid LP to the present case, it can be said that the RHC has set conditions limiting the court to act within it and not outside its scope; always bearing in mind that the court cannot on its own accord override an express procedural requirement laid out in the RHC. Be that as it may, this court is invested with extensive powers to strike out pleadings, to dismiss actions by plaintiffs or for that matter to enter judgments against defendants. These powers are necessary evils. It is necessary for the courts generally to not only enforce the basic rules of pleadings but also to take immediate steps to dispose of proceedings which are hopeless, baseless or without foundation or are otherwise an abuse of the process of the court. The courts normally exercise these powers by summary process, operating speedily and at an early stage of the proceedings. Without a doubt it is an effective method to dispose of proceedings without the need to call witnesses.

A The summary powers of the court to strike out pleadings, dismiss actions and enter judgments are derived from two major sources. One source is under the RHC. The other source flows from the court's inherent jurisdiction. Lord Esher in *Davey v Bentinck* [1893] 1 QB 185 (CA) at p 187 was of the view that these two sources are cumulative and not alternative, and may be invoked by the parties and employed by the court B simultaneously. Lord Blackburn in *Metropolitan Bank v Pooley* (1885) 10 App Cas 210 at pp 220 and 221 and Brown LJ in *Willis v Earl Beauchamp* (1886) 11 PD 59 at p 63, had earlier on blazed the same trail and held similar views as that of Lord Esher MR in *Davey*'s case. One must not forget that such summary powers are permissive, not mandatory, and they C confer a discretionary jurisdiction upon which the court will exercise its judicial discretion in the light of all the surrounding circumstances concerning the offending pleading (see *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 3)* [1970] Ch 506; [1969] 3 All ER 897; *Hampshire County Council v Shonleigh Nominees Ltd* [1970] 2 All ER 144; [1970] 1 WLR 865). Two other fundamental principles governing the summary powers of D the court to strike out pleadings must be put forth. It is this:

(1) The parties will not easily be driven from the seat of judgment or to borrow the words of Fletcher-Moulton LJ in *Dyson v A-G* [1911] 1 KB 410 at 419:

> E To my mind, it is evident that our judicial system would never permit a plaintiff to be 'driven from the judgment seat' in this way without any court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad.

Thus, the courts have, in the past and in the near future, exercised its F discretionary power with the greatest care and circumspection, and only in the clearest cases (see *Lawrance v Lord Norreys* (1890) 15 App Cas 210 (HL) at p 219).

(2) The dismissal of the proceedings or even the stay thereof may 'often be required by the very essence of justice to be done' (see *Metropolitan Bank Ltd v Pooley* (1885) 10 App Cas 210 (HL) at p 221), and this G is normally done in order to prevent the parties from being harassed and put to considerable expense by frivolous, vexatious or hopeless litigation (see *Riches v DPP* [1973] 2 All ER 935 at p 942; [1973] 1 WLR 1019 at p 1027).

With these principles in the forefront of my mind, and bearing in mind H that the rules of the RHC must be strictly obeyed for the expeditious despatch of litigation, it is my judgment that in an application under O 18 r 19(1)(a) of the RHC, there was no necessity to refer to encls 10 and 15; only encl 2 must be relied upon (see *Republic of Peru v Peruvian Guano Co* (1887) 36 Ch D 489 at p 498; *A-G of the Duchy of Lancaster v London and* I *North Western Railway Co* [1892] 3 Ch 274 (CA)). In *Wenlock v Moloney & Ors* [1965] 2 All ER 871; [1965] 1 WLR 1238 (CA), it was held that in determining the sole question whether the statement of claim discloses a reasonable cause of action the court ought not to have regard to any affidavit evidence. This must be the correct approach to adopt and I so adopt accordingly.

Next, it was argued that by looking at the statement of claim at encl 2, the alleged wrongful dismissal of the plaintiff took place on 7 November 1990 but the plaintiff filed his writ with an indorsement of the statement of claim on 29 March 1995 — an apparent delay of 4 years 4 months 22 days. Indeed it was said that that was an inordinate delay of such magnitude that this court should not seek to condone.

Suppuletchimi v Palmco Bina Sdn Bhd [1994] 2 MLJ 368, a decision of the High Court, was cited to drive home the point that O 92 r 4 of the RHC could circumvent O 18 r 19(1)(a) of the RHC to enable encls 10 and 15 to be considered in order to prevent injustice. But *Suppuletchimi* seems to reject the decision of the Federal Court in the case of *New Straits Times (M) Bhd v Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 MLJ 226 and that of the then Supreme Court in the case of *Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16 (SC). The learned judge in *Suppuletchimi* said this at p 379:

> Prayer (ii) sought to have the writ of summons dated 6 October 1993 struck off under O 18 r 19(1)(a) or (b) or (c) of the RHC so framed in the alternative rather than, eg, under (a) alone, presumably in part because it is often submitted that by virtue of O 18 r 19(2), averments in affidavits should be disregarded or given little consideration in applications made under O 18 r 19(l)(a) of the RHC, as the only issue for determination in such applications should be whether the pleading or endorsement on the face of it discloses a reasonable cause of action or defence as the case may be. See *New Straits Times (M) Bhd v Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 MLJ 226. See also *Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16. This statement of law is not of absolute application — it is not entirely correct — as in my considered opinion, this position in law governs only if the court does not decide to invoke its inherent jurisdiction under O 92 r 4.
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> Even though O 18 r 19(2) provides that 'no evidence shall be admissible on an application under paragraph (1)(a)', yet O 92 r 4 states that 'nothing in these rules shall be deemed to limit or affect the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.' Clearly O 92 r 4 would appear to override r 19(2). However, such a construction may not be necessary as in my opinion O 92 r 4 could be triggered into action only when the court, upon reading the affidavits, decides to exercise its inherent powers.
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> As such, even in an application under O 18 r 19(1)(a), the court would still be entitled, in its inherent jurisdiction, to look at and decide upon the contents of the affidavits. By the time that such applications come up for hearing, the parties would have had ample opportunities to cure by amendments, any shortfalls in drafting the pleadings, and the application for striking off would necessarily be based on the amended pleadings. It does not preclude the court from studying the affidavits to ask itself whether, from the affidavit evidence before the court, it is satisfied that the claim discloses a reasonable cause of action or defence as the case may be.

With respect, I do not propose to adopt *Suppuletchimi*. I am bound by the decisions of the superior courts in this country. The use of precedent as an indispensable foundation upon which to decide what the law is and its application to individual cases can never be questioned. It provides some

measure of certainty upon which parties can rely in the conduct of their affairs. This would in turn lead to an orderly development of legal rules. Thus, the use of authorities or decided cases is the establishment of some principle which the judge can follow in deciding the case before him: *Re Hallett's Estate, Knatchbull v Hallett* (1880) 13 Ch D 696 (CA) at p 712; *Smith v Harris* [1939] 3 All ER 960 (CA) at 965. However, a note of warning must be lodged. It is a correct statement of the law to say that every judgment must be read as applicable to the particular facts proved, the laws expounded therein are governed and qualified by the particular facts of the particular case and are not intended to be expositions of the whole law: *Quinn v Leathem* [1901] AC 495 (HL) at p 506; *Miller-Mead v Minister of Housing and Local Government & Anor* [1963] 2 QB 196 at p 236; [1963] 1 All ER 459 at p 476.

Reverting back to the issue of inordinate delay, s 2(a) of the Public Authorities Protection Act 1948 enacts that:

> Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect —
>
> (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within 36 months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within 36 months next after the ceasing thereof; ...

Thirty-six months or three years would be the cut-off point before limitation sets in. Applying the limitation objection as advanced by the defendants, the cause of action arose on 7 November 1990 when the purported wrongful dismissal took place and the last date for filing the writ which was indorsed with the statement of claim would be 6 November 1993. However, since the writ indorsed with the statement of claim was filed on 29 March 1995, the delay, if calculated from 6 November 1993, would still be 1 year 4 months 22 days. But on the plain reading of s 2(a) of the Public Authorities Protection Act 1948 the 'act' of the purported wrongful dismissal should be the date wherein time should run and that being the law the delay here was in fact 4 years 4 months 22 days. On the question of limitation, *Riches v DPP* [1973] 1 WLR 1019 may be referred to where Davies LJ had this to say (at p 1024 line G):

> I do not want to state definitely that, in a case where it is merely alleged that the statement of claim discloses no cause of action, the limitation objection should or could prevail. In principle, I cannot see why not. If there is any room for an escape from the statute, well and good; it can be shown. But in the absence of that, it is difficult to see why a defendant should be called upon to pay large sums of money and a plaintiff be permitted to waste large sums of his own or somebody else's money in an attempt to pursue a cause of action which has already been barred by the Limitation Act 1939 and must fail.

In the same vein, Stephenson LJ in the same case propounded the following principles (at p 1026 line D):

> On the other point I am willing to assume that a cause of action which is statute barred as clearly as the plaintiff's cause of action, nonetheless may be a reasonable cause of action within RSC, O 18 r 19(1)(a). I say that on the authority of *Dismore v Milton* [1938] 3 All ER 762, to which Davies LJ has referred. But I agree with his comments upon that case. It seems to me that that case is in no way a decision that the court cannot strike out a claim which is statute barred on the ground that it is an abuse of the process of the court, where it is clear from the terms of the summons that the statute is going to be relied upon and where, as here, counsel has told the court that he has express instructions to rely upon the statute. Even in such a case there may be a possibility of a defendant bringing himself within one of the exceptions which avoid the statute and make it inapplicable. Again, however, this is not such a case. There is no material put before the court which could possibly suggest that the statute will not be a complete answer to the plaintiff's claim. I think that it would be absurd for the court, faced with an application such as this to strike out, under its inherent jurisdiction or under the rules, a claim as an abuse of the process of the court, to shut its eyes to the fact that there is going to be raised an apparently unanswerable plea of the Limitation Act 1939. That was the view of this court in *Wenlock v Shimwell*, 27 April 1966; *Bar Library Transcript No 114A*, to which Davies LJ has referred, and was clearly the view of Lord Denning MR in *Hanratty v Butler*, 12 May 1971; *Bar Library Transcript No 171*, in the passage which Davies LJ has also cited. Why should such a claim not be an abuse of the process of the court? Why should not the court exercise its inherent jurisdiction to stay or to dismiss an action which must fail?

Lawton LJ, approached the question of limitation in the *Riches* case in this way (at p 1027 at line B):

> One of the uncontested sets of facts which arises from time to time is when on the statement of claim it is clear that the cause of action is statute barred and the defendant tells the court that he proposes to plead the statute and, on the uncontested facts, there is no reason to think that the plaintiff can bring himself within the exceptions set out in the Limitation Act 1939. In those circumstances it is pointless for the case to go on so that the defendant can deliver a defence. The delivery of the defence occupies time and wastes money; and even more useless and time consuming from the point of view of the proper administration of justice is that there should then have to be a summons for directions, and an order for an issue to be tried, and for that issue to be tried before the inevitable result is attained.

In *Tio Chee Hing & Ors v Government of Sabah* [1981] 1 MLJ 207, the then Federal Court applied the principles set forth in the *Riches* case and held that the appellants' claim there was clearly statute-barred and not maintainable against a defence that relied on limitation. In *Tio Chee Hing*'s case, the government of Sabah did not enter an appearance or file a defence but applied to strike out the statement of claim on the ground, inter alia, that the claim was statute-barred. The learned trial judge held that the claim was statute-barred and he dismissed the claim for damages. On appeal to the then Federal Court, the decision of the learned trial judge was affirmed.

Eusoff Chin J (as he then was and now the Chief Justice) had occasion to consider the limitation period under s 2(1) of the Public Authorities Protection Act 1948 in *Haji Hussin bin Haji Ali & Ors v Datuk*

Haji Mohamed bin Yaacob & Ors and connected cases [1983] 2 MLJ 227 and there his Lordship in a well-considered judgment applied the *Riches* case and came to the conclusion that the three actions were filed after the three years' limitation period and dismissed the plaintiffs' actions with costs. On appeal to the then Federal Court, the decision of his Lordship Eusoff Chin J (as he then was and now the Chief Justice) was affirmed.

Now, it is trite law that the protection afforded by the statute of limitation cannot be waived by merely acknowledging service of a writ (see *The Llandovery Castle* [1920] P 119; *The Alnwick* [1965] P 357; [1965] 2 All ER 569; [1965] 1 Lloyd's Rep 320 (CA)). The limitation applies equally to counterclaims and cross-actions (see *The Gniezno* [1967] 2 All ER 738; [1967] 1 Lloyd's Rep 441. It is beyond peradventure that the long inordinate delay of 4 years 4 months 22 days should be construed against the plaintiff and on this very ground alone the plaintiff's claim in encl 2 should be dismissed forthwith.

Next, it was argued that there was a considerable delay in filing the writ with an indorsed statement of claim for a declaration. The pronounced and undue laches were said to be a bar to a declaration. It was the defendants' stand that the doctrine of laches estopped the plaintiff from seeking a declaration. In *Eshah bte Sa'at v Meriam bte Sa'at & Ors* [1975] 2 MLJ 97, Abdul Razak J spoke of delay in filing a declaration in this fashion (at p 97):

> There has also been a considerable delay in asking for the declaration. No doubt time unlike in certiorari is no bar to a declaration. But undue laches should be a bar to a declaration ... otherwise we will have seen the last of the remedy of certiorari. There has been a lapse of two years since the Collector made his award before the plaintiff made the application for a declaration to impugn it.

It is trite law that in equity a plaintiff is bound to prosecute his claim without undue delay. A court of equity will not entertain stale demands or where the plaintiff, just like the plaintiff here, has slept upon his legal right and acquiesced for a considerable length of time. Lord Camden aptly described a sleeping plaintiff in *Smith v Clay* (1767) 3 Bro CC 639n as: 'Equity aids the vigilant, not the indolent.' If that happens, just like in the present case before me, the plaintiff is said to be barred by his laches. Two principle factors must be considered when determining whether the delay was such as to amount to laches. Firstly, acquiescence on the plaintiff's part. Secondly, a change of position on the defendant's part. In the context of the present case, acquiescence would be after the purported dismissal of the plaintiff by the defendants and the plaintiff became aware of it. It would be unjust to allow the plaintiff to procrastinate at the expense of the defendants in the present case (see *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221 at p 239). To borrow the words of Lord Blackburn in *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218 at p 1279:

> Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.

In my judgment, the principle of laches should be vigorously applied in favour of the defendants. The plaintiff acquiesced for a great length of time in prosecuting his claim. Since the plaintiff knew that the purported dismissal was on 7 November 1990 as reflected in encl 2, he must be said to have knowledge, capacity and freedom to challenge the defendants. Yet, he chose to procrastinate. The doctrine of estoppel too can be invoked in favour of the defendants. Lord Denning MR in *Moorgate Mercantile Co Ltd v Twitchings* [1975] 3 All ER 314 at p 323; [1975] 3 WLR 286 at p 296 described estoppel in erudite terms and it bears repetition: 'Estoppel is not a rule of evidence. It is not a cause of action. It is a principle of justice and of equity.'

Since I have excluded encls 10 and 15, the delay which the plaintiff took to file encl 2 was not explained at all (see *Eshah bte Sa'at v Meriam bte Sa'at & Ors* [1975] 2 MLJ 97 and *Haji Hussin bin Haji Ali & Ors v Datuk Haji Mohamed bin Yaacob & Ors and connected cases* [1983] 2 MLJ 227). In the event I have erred in excluding encls 10 and 15, I shall now proceed to examine these enclosures in an attempt to see whether the delay which was sought to be explained by the plaintiff was reasonable and acceptable. On a perusal of encl 15, it took the plaintiff 11 months 26 days to engage a counsel of his own choice after the purported dismissal. To be precise, the plaintiff engaged Messrs Zaidan & Co as his solicitors on 3 November 1991 as reflected in exh A of encl 15 which is reproduced hereinunder for reference.

ZAIDAN & CO
ADVOCATES & SOLICITORS/PEGUAMBELA & PEGUAMCARA
LOT 1, TINGKAT 3, WISMA ILMU, JALAN DOKTOR,
15000 KOTA BHARU, KELANTAN.
Tel: 09-746611, 746621 Tel Fax: 09-748660

Our Reference: Z/MISC/41/91

Date: 3 November 1991

Tuan

PER: PERLANTIKAN PEGUAM

Perkara di atas adalah dirujuk.

Adalah dengan ini, kami telah dilantik bagi mewakili anakguam kami Encik Ibrahim bin Mohamed yang beralamat di Kg Kedai Buloh, Jalan Kuala Besar, Kota Bahru, Kelantan yang berkuatkuasa dari tarikh surat ini dibuat.

Sekian, terima kasih.

Yang benar

—tt—

The letter as reproduced contained precious little. It was couched in general terms and it could be that the solicitors acted for the plaintiff for some other matter. It is a matter of speculation — more of a conjecture as the said law firm has ceased to operate. There was no explanation at all in encls 10 and 15 as to what the plaintiff did after he had engaged Messrs

Zaidan & Co. It would certainly be unreasonable for the plaintiff to wait until 29 March 1995 before filing the writ indorsed with the statement of claim in encl 2. What happened between the time the plaintiff engaged Messrs Zaidan & Co on 3 November 1991 and the time when the plaintiff engaged Messrs Tia & Noordin on 4 January 1995 was not explained at all in both encls 10 and 15. No explanations were made available for the delay of 3 years 4 months 22 days between the time the plaintiff engaged Messrs Zaidan & Co to the time of filing encl 2. But one thing is certain. The plaintiff was putting the blame on Messrs Zaidan & Co for failing to act expeditiously. By way of an analogy in *Gan Hay Chong v Siow Kian Yuh & Anor* [1975] 2 MLJ 129, in dismissing the appeal of the appellant, the then Federal Court held that the mistake of the appellant's solicitors in the circumstances of the case, did not constitute a sufficient ground for granting the extension of time.

Finally, it was argued that the declarations sought for in encl 2 were nothing more than an abuse of the process of the court. I entirely agree with this submission for the following reasons:

(1) The plaintiff did not apply under O 53 of the RHC for an order of certiorari to quash the decision of the first defendant;

(2) The plaintiff failed to file a civil suit for damages for wrongful dismissal against the first and fourth defendants within the three years' limitation period as set out under s 2(a) of the Public Authorities Protection Act 1948;

(3) The plaintiff sought to circumvent O 53 of the RHC and the limitation impediment by filing a writ indorsed with a statement of claim for several declarations therein. I had occasion to say in *Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru* [1995] 2 MLJ 287 at p 301 to the effect that:

> The plaintiff must have thought that by seeking declaration for prayer 3, he need not obtain the necessary leave as spelt out in O 53 of the RHC. It is apparent that it was an abuse of the process of the court for the plaintiff to proceed by way of an originating summons in encl 4 when he knew fully well that by so doing he would be bypassing the leave requirement as stipulated in O 53 of the RHC.

Raja Azlan Shah Ag LP (as his Majesty then was) speaking for the then Federal Court in *Land Executive Committee of Federal Territory v Syarikat Harper Gilfillan Bhd* [1981] 1 MLJ 234 especially at p 236 laid down a well-defined route for this court to follow. This was how his Majesty in refined words put it:

> Thus it can be seen that the modern use of declaratory judgment has already developed into the most important means of ascertaining the legal powers of public authorities in the intricate mixture of public and private enterprise which is becoming a distinctive feature of our life. But we must add a warning note that its use must not be carried too far. The power to grant declaratory judgment in lieu of the prerogative orders or statutory reliefs must be exercised with caution. The power must be exercised 'sparingly', with 'great care and jealousy'. I said in *Dato Menteri Othman bin*

Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus [1981] 1 MLJ 29 that the power to grant a declaration should be exercised with a proper sense of responsibility and after a full realization that judicial pronouncements ought not to be issued unless there are circumstances that properly call for their making. Beyond that there is no legal inhibition to the grant of declaratory judgment. That is consistent with the attitude of the courts in this country. To some it may appear that justice is being denied by a timid and conservative approach. They are wrong. Consistency makes for certainty, and this court being at the centre of the legal system in this country, is responsible for the stability, the consistency and the predictability of the administration of law.

I am acutely aware that declarations that decisions made without jurisdiction are void and of no effect have been granted against arbitrators (*Jungheim, Hopkins & Co v Foukelmann* [1909] 2 KB 948; *Oil Products Trading Co Ltd v Societe Anonyme Societe de Gestion D'Entreprises Coloniales* (1934) 150 LT 475; *Oakland Metal Co Ltd v D Benaim & Co Ltd* [1953] 2 QB 261), domestic tribunals (*Abbott v Sullivan & Ors* [1952] 1 KB 189; *Lee v The Showmen's Guild of Great Britain* [1952] 2 QB 329) and statutory tribunals (*Cooper v Wilson & Ors* [1937] 2 KB 309; *Barnard & Ors v National Dock Labour Board & Ors* [1953] 2 QB 18; *Vine v National Dock Labour Board* [1957] AC 488). Unfortunately, the facts here are poles apart from the authorities cited above. Here, s 2(a) of the Public Authorities Protection Act 1948 was plainly against the plaintiff right from the start. Sympathetic though I may be for the plaintiff, I had no choice but to allow encl 17 with costs.

Appeal allowed.

Reported by Ng Sheau Jiuan